DIRECTOR-GENERAL OF INLAND REVENUE

v.

SIONG HOE BISCUIT & CONFECTIONERY FACTORY SDN. BHD.

HIGH COURT MALAYA, MELAKA
RICHARD TALALLA J
[HC TAX APPEAL NO. 14-2 OF 1986]
23 SEPTEMBER 1991

CIVIL PROCEDURE - JURISDICTION: *Whether the High Court can hear a case stated from the Special Commissioners - Only after deciding order made - Proper application for judicial review - Income Tax Act 1967, ss. 91(1), (3), Schedule 5, paras. 22, 23, 34, 39, 45(a), 48 - Rules of the High Court 1980, O. 53.*

The appellant raised against the respondent additional assessment of income tax for the years 1964 to 1978 inclusive (14 years). Although, s. 91(1) of the Income Tax Act 1967 (the Act) only stipulated a 12 year limitation period, the appellant claimed to be entitled to raise additional assessment for the whole 14 years under s. 91(3) of the Act as it intended to prove wilful default on the part of the respondent.

The respondent appealed to the Special Commissioners and the appellant objected, tendering returns and assessments of the respondent for the years 1979 and 1980, which were outside the period of dispute. The respondent's objection to the admissibility of these returns and assessments was upheld by the Commissioners. The appellant gave notice of intention to appeal against the Commissioners' ruling. The Commissioners purporting to Act under paras. 22 and 45(a) of schedule 5 of the Act referred the matter to this Court by way of case stated for an opinion as to whether on the facts found and stated by the Commissioners, their ruling was correct in law. The respondent raised a preliminary objection arguing that it was not competent for the Commissioners to refer this matter to the Court by way of case stated because the appellant's appeal was not expressly governed by the provisions of the Act.

Held:

[1] The jurisdiction of the High Court to entertain an appeal from a decision of the Commissioners can be found in para. 34 of Schedule 5 of the Act. A party who is dissatisfied with an order made by the Commissioners and requires them to state the case for the opinion of the High Court, can only do so after the Commissioners have made a deciding order and not before.

[2] Under para. 48 of Schedule 5, a deciding order means a deciding order under para. 23 and can only be made after the Commissioners have completed the hearing of an appeal and given their decision on that appeal. None of these had been done in this instance.

[3] The appellant should have awaited the completion of the hearing of the appeal by the Special Commissioners and their decisions in the form of deciding order as defined and then if dissatisfied with that order, proceed by requiring the Special Commissioners to state a case for the opinion of the High Court.

[4] In addition, in this case there was no proper application for judicial review as the requirements of O. 53 of the Rules of the High Court 1980 were not complied with. Neither should judicial review be allowed to supplant normal statutory appeal procedure.

[Appeal dismissed with costs.]

Cases referred to:

Regina v. Brentford General Commissioners, (ex parte Chan et al) 57 TC 651 ***(cons)***
Bye v. Coren & Anor. [1986] Vol. 130 Solicitors' Journal 542 ***(cit)***
Samuel Bruce v. Burton 4 TC 399 ***(cit)***
Furtado v. The City of London Brewery Co. Ltd. 6 TC 382 ***(cons)***
PP v. Raymond Chia Kim Chwee & Anor; Zainal bin Haji Ali v. PP [1985] CLJ (Rep) 260 ***(cons)***
PP v. Hoo Chang Chwen [1962] 28 MLJ 284 ***(cit)***
PP v. R.K. Menon & Anor. [1978] 2 MLJ 152 ***(cit)***
R. v. Inland Revenue Commissioners, Ex parte Preston [1985] AC 835 ***(cit)***
The Trustees' Corporation (India) Ltd. v. The Commissioners of Income-tax, Bombay Presidency [1930] AIR PC 151 ***(cons)***

Legislation referred to:

Criminal Procedure Code, ss. 51, 129(i)(b), 307(i)
Customs & Inland Revenue Act 1890 [UK], s. 23
Finance Act 1896 [UK], s. 27
Income Tax Act 1967, ss. 91(1), 91(3), 102(4), Schedule 5, paras. 22, 23, 34, 39, 45(a), 48
Income Tax Act 1922 [Ind], s. 66(2)
Rules of the High Court 1980, O. 53
Taxes Management Act 1970 [UK], s. 56(6)
Taxes Management Act 1842 [UK], s. 134

For the Appellant - Mohamed Bazain bin Idris, SFC.
For the Respondent - A.C. Vohrah; M/s. Vohrah & Tan Chee Lan and Cyrus V. Das; M/s. Shook Lin & Bok

JUDGMENT

Richard Talalla J:

The appellant raised against the respondent additional assessment of income tax for the years 1964 to 1978 inclusive. Because there was a 14 year period involved it went outside the 12 year limitation period stipulated in s. 91(1) of the Income Tax Act 1967 (the Act). The appellant claimed to be entitled to raise additional assessment for the whole 14 years by reference to s. 91(3) of the Act as it was intended to prove fraud or wilful default on the part of the respondent. Sections 91(1) and 91(3) of the Act read as follows:

> 91(1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within twelve years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.
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> (3) The Director General where it appears to him that:
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> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
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> (b) any person has been negligent,
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> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

The appellant had raised the additional assessment for the 14 years.

The respondent being aggrieved by the same appealed to the Special Commissioners against

that assessment. In the course of the hearing of the appeal the appellant sought to prove fraud and wilful default on the part of the respondent by tendering the returns and assessments for the years of assessment 1979 and 1980 which were outside the period of dispute. The respondent's representative objected to the tendering of those returns and assessments, claiming them to be inadmissible in evidence. The Commissioners upheld the objection. The appellant gave notice of intention to appeal against the decision of the Commissioner ruling the evidence to be inadmissible. The Commissioners, purporting to act under paras. 22 and 45(a) of Schedule 5 of the Act and considering themselves supported by the case of *Regina v. Brentford General Commissioners, (ex parte Chan et al)* 57 TC 651 and *Bye v. Coren & Anor.* [1986] Vol. 130 Solicitors' Journal 542 referred the matter to this Court by way of case stated for an opinion as to whether on the facts found and stated by the Commissioners, their ruling was correct in law.

The *Brentford* case was one in which the applicant taxpayers had appealed to the Commissioners against certain assessments. When the matter came on for hearing an adjournment was sought on behalf of the applicants but refused. The applicants moved for judicial review of the decision refusing the adjournment. In the High Court the Crown took the preliminary point that judicial review was inappropriate because a case stated which was already in train provided a remedy for the taxpayers' alleged injustice. Taylor J accepted the point and dismissed the application. In doing so the learned Judge touched on s. 56 of the English Taxes Management Acts 1970 which provided for an appeal by case stated, gave the High Court wide powers by reference to subsection (6) of that section and which in the Judge's view enabled the Court to review a refusal of the Commissioners to exercise their discretion to adjourn appeals.

No here in the *Brentford* case could I find that the Court held that the proper course for an appeal on procedural matters is by way of case stated as our Special Commissioners said in the case they stated to this Court. In any event, with respect, it seems to me that the Special Commissioners fell into the common error of relying on an English decision for authority without first ascertaining whether the law upon which that decision is based is the same as our law. Unfortunately as it turns out, the law is patently different, the English provisions empowering appeal by case stated in wide terms and ours confining appeal by case stated only against a deciding order as statutorily defined.

The Special Commissioners as stated above also relied on *Bye v. Coren.* I regret I found that case unhelpful inasmuch as there was no issue before the Court as to jurisdiction.

In *Samuel Bruce v. Burton* 4 TC 339 the appellant was deemed properly assessed for tax which he paid. He then made application to the Commissioners for repayment of part thereof on certain grounds, the said repayment was claimed as to one amount under s. 27 of the Finance Act 1896 and as to another amount under s. 23 of the Customs and Inland Revenue Act 1890. The application was dismissed. The appellant being dissatisfied with the decision of the Commissioners required them to state a case for the opinion of the High Court. The Commissioners complied, the case stated being whether, assuming the Commissioners did have jurisdiction to state the case, their determination was right in law. Before the High Court Counsel for the respondent took a preliminary point namely that under the appeal sections of the legislation in question to wit the (Taxes Management Act 1880) there had to be three steps, first an assessment, then an appeal to the Commissioners and then a case stated. Counsel submitted that there was no assessment in question, that there was no appeal given to the Commissioners and therefore there was no power given to state any case. The Court accepted the preliminary objection and dismissed the appeal.

Again in *Furtado v. The City of London Brewery Co. Ltd.* 6 TC 382 where the appellant had

made application under s. 134 of the Income Tax Act 1842 for repayment of tax already assessed, not appealed against and paid, the English Court of Appeal held likewise, agreeing with the *dictum* of Scrutton J at first instance which is as follows:

> Now the matter stands in this way on the statutes. The Taxes Management Act 1880, by s. 59, provides that immediately upon the determination of any appeal under the Income Tax Acts by the General Commissioners, the appellant or the surveyor may declare his dissatisfaction and require the Commissioners to state a case which will set forth the facts and the determination of the Commissioners. That is a right of appeal from the decision of the Commissioners in matters of law given by the statute, and it is immediately upon the determination of any appeal under the Income Tax Acts. In a proceeding which is not an appeal under the Income Tax Acts there is no power given by the statute to state a special case, and no appeal lies. The question, therefore, seems to be, is the proceeding which takes place under s. 134 an appeal by the subject, the person taxed, to the General Commissioners. If it is an appeal, the Taxes Management Act 1880, gives a right to appeal by special case.
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> Now, s. 134 of the Act of 1842, and s. 133 of the same Act, now repealed, both assumed an assessment properly made and not appealed against and standing, and provided that by reason of something which happened after the assessment the assessment might be amended, that is to say, that though it was right at the time it was made, some fact which has happened afterwards and which was not before the people who originally made it may give a right to have it amended with relief to the party charged. Accordingly, s. 134 provided that, on the happening of certain events during and before the end of the year for making such assessment, it shall be lawful for such person "to make application to the Commissioners for General "Purposes within three calendar months after the end of the "year and on due proof thereof to their satisfaction the said "Commissioners shall cause the assessment to be amended."
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> Now, if the matter stood there alone, and I had only s. 134 and the Taxes Management Act, I should have thought that that was not an appeal. It assumes that the assessment is properly made and it asks for relief by reason of something that has happened after the assessment in question. That, I should have thought, was not properly described as an appeal, but was properly described as an application for relief, and, not being properly described as an appeal, it would not come within the language of the Taxes Management Act of 1880 - an appeal under the Income Tax Acts.

Incidentally in the *Furtado* case the Court of Appeal held that the rule of law is that although *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly governed by statute.

Counsel for the respondent in this case in the same way raised a preliminary objection saying that it was not competent for the Commissioners to refer this matter to this Court by way of case stated because the appellant's appeal was not expressly governed by the provisions of the Act. It was not against a deciding order made by the Commissioners and that in fact the appeal before the Commissioners is still pending. Accordingly the appellate provisions of the Act had to be examined.

The jurisdiction of this Court to entertain an appeal from a decision of the Commissioners can be found in para. 34 of the 5th Schedule of the Act, which reads as follows:

> Either party to proceedings before the Special Commissioners may appeal on a question of law against a deciding order made in those proceedings (including a deciding order made pursuant to para. 26(b) or (c) by requiring the Special Commissioners to state a case for the opinion of the High Court ...

It will be seen at once that a party who is dissatisfied with an order made by the

Commissioners and requires them to state a case for the opinion of this Court can only do so in the event of the Commissioners making a deciding order and not before.

Paragraph 23 of the Schedule reads as follows:

> As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decision on the appeal in the form of an order which shall be known as a deciding order and which, subject to this Schedule, shall be final.

Paragraph 39 of the Schedule reads as follows:

> The High Court shall hear and determine any question of law arising on a case stated under para. 34 and may in accordance with its determination thereof:
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> (a) order the assessment to which the case relates to be confirmed, discharged or amended;
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> (b) remit the case to the Special Commissioners with the opinion of the Court thereon; or
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> (c) make such other order as it thinks just and appropriate.

Thus by reference to para. 39 this Court is required to hear and determine any question of law arising on a case stated under para. 34. Looking at para. 34 the appeal to this Court is only possible if it is against a deciding order. In para. 48 "deciding order" is said to mean a deciding order made under para. 23 and by reference to para. 23 a deciding order can only be made after the Commissioners have completed the hearing of an appeal and given their decision on that appeal. None of those things has been done in this instance.

Pursuant to s. 102(4) of the Act Schedule 5 has effect of regulating the hearing and determination of the appeal to the Commissioners and otherwise as provided therein. It will be seen that paras. 22 and 45(a) of the said Schedule referred to in the case stated by the Special Commissioners to support their ruling appealed against relate to matters of procedure at the hearing. The paragraphs read as follows:

> 22. Subject to this Act and any rules made under s. 154(1)(d), the Special Commissioners may regulate the procedure at the hearing of an appeal and their own procedure.
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> 45. Directions for the settlement or disposal of any matter of a procedural nature arising in connection with proceedings before the Special Commissioners, the High Court or the Federal Court under this Schedule may, if no other provision is made by or under this Act or rules of Court for the settlement or disposal of the matter, be given:
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> (a) in relation to proceedings before the Special Commissioners, by one of the Special Commissioners on an application made in whatever manner he considers appropriate;

As stated in *Halsbury's Laws of England* 4th Edn., Vol. 37 para. 10 there is a vital and essential distinction between substantive law and procedural law. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties. The function of practice and procedure is to provide the machinery or the manner in which legal rights or status and legal duties may be enforced or recognised by a Court of law or other recognised or properly constituted tribunal. Whether the ruling of the Special Commissioners appealed against by way of this case stated is one based on substantive law or procedural law is to my mind irrelevant. It is only against a deciding order as statutorily defined that appeal lies.

Senior Federal Counsel arguing on behalf of the appellant against the preliminary point submitted that the order made by the Commissioners was in itself a deciding order notwithstanding that it was made at an interlocutory stage. He submitted that this was so inasmuch as the order determined finally the rights of the parties on the issue then at hand

namely the admissibility in evidence of the returns and assessments for the years outside the period of dispute.

By way of analogy Federal Counsel made reference to *PP v. Raymond Chia Kim Chwee & Anor.*, *Zainal Bin Hj. Ali v. PP* [1985] CLJ (Rep) 260, where at p. 264 the Supreme Court held that the right of a person to ask for a document or other material in a criminal proceeding under s. 51 of the Criminal Procedure Code (the Code) is a right exercisable at the discretion of the Court. Thus a decision or order to issue a summons under s. 51 of the Code was, so the Court held, a final order in the sense that it was final in its effect and therefore appealable under s. 307(1) of the Code. However it was there held further that such a decision or order is distinguishable from a purely "procedural" ruling as described in *PP v. Hoo Chang Chwen* [1962] 28 MLJ 284 and *PP v. R.K. Menon & Anor*. [1978] 2 MLJ 152. In the former case Rose CJ of Singapore dealt with an appeal on the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. In the latter case Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with s. 129(i)(b) of the Code was a procedural and non-appealable ruling.

Section 307(1) of the Code provides generally for a party who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court to have a right of appeal to the High Court. I do not see that any analogy can be drawn from that section and the case law thereunder to support the appellant's case here.

The ruling by the Special Commissioners on the admissibility of the returns in question was similar to the ruling of the learned Magistrate in *PP v. Hoo Chang Chwen* abovestated and as found by Rose CJ in that case would appear to be a procedural ruling. Consequently even if an analogy can be drawn from the situation under s. 307(1) of the Code, the ruling is not an appealable order.

It is significant that in the same case Rose CJ said that to arrive at any other conclusion would seem to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural and that the proper time to take such points should be upon appeal, after determination of the principal matter in the trial. Likewise the Privy Council case of *The Trustees' Corporation (India) Limited v. The Commissioners of Income-Tax, Bombay Presidency* [1930] AIR PC 151. In that case which was an appeal from a judgment of the High Court at Bombay, upon a reference made to that Court by the Commissioners of Income-tax under s. 66(2) of the Indian Income-tax Act 1922 Lord Blanesburgh in his speech confirmed the view of the board that the High Court would be well advised to require before they seek to entertain any question under s. 66 that the preliminary requirements of the section were strictly complied with, it being the intention of the enactment that the High Court is not to be flooded with such applications. It may well be that our own provisions limiting appeal by way of case stated to that against a deciding order as statutorily defined bear the same object namely of ensuring that this Court is not inundated with applications such as the present.

Lastly it was submitted on behalf of the appellant that this Court should grant the appellant relief by way of judicial review. I do not agree. The view I take is that the appellant should have awaited the completion of the hearing of the appeal by the Special Commissioners and their decision in the form of a deciding order as defined and then if dissatisfied with that order proceed by requiring the Special Commissioners to state a case for the opinion of this Court. In any event there was no proper application for judicial review. Ordinarily such

application will need to meet all the requirements of O. 53 of the Rules of the High Court 1980. What is more it is well established law that judicial review should not ordinarily be granted where an alternative remedy is available by way of appeal procedures expressly provided by tax legislation. It should not be allowed to supplant the normal statutory appeal procedure. See *R. v. Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835 per Lord Templeman at p. 862.

The appeal is accordingly dismissed with costs to be taxed.

Also found at [1991] 3 CLJ 2858